Supreme Court, U.S.
FILED

95-8 JUN 30 1995

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,

Petitioner,

v.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 30, 1995

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QUESTIONS PRESENTED

The patent on doxorubicin, a leading anticancer drug, expired in 1988. Despite high entry barriers, a generic manufacturer captured 30% of the market previously monopolized by the patentee and its vertically-integrated distributor. The former monopolist and distributor then entered into an exclusive contract to supply the generic manufacturer's distributor, thereby regaining an 89% share of the market and eliminating their competitor from the market.

1. In a concentrated market characterized by high entry barriers, can the restoration of a monopoly by capturing a rival manufacturer's only viable distributor be considered "pro-competitive," so as to require summary judgment for the monopolist on the excluded rival's claim of antitrust law violations?

2. Is "making money" a valid business justification which eliminates antitrust liability for a vertically integrated manufacturer/distributor to enter into an exclusive supply contract with its only significant competitor's distributor and thereby arrest price competition by eliminating the competitor from the market?

3. Does the cessation of price competition at the wholesale level constitute an injury to competition?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit were Sicor Limited and Alco Chemicals Ltd., as Plaintiffs-Appellants; and Cetus Corporation, Cetus Generic Corporation, Ben Venue Laboratories, Inc., Ben Venue Generic Corporation, and Cetus-Ben Venue Therapeutics, as Defendants-Appellees.

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Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petitioners, Sicor Limited and Alco Chemicals Ltd. ("Sicor"), hereby petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., infra, 1a-31a) is reported at 51 F.3d 848 (1995). The opinion of the United States District Court for the Northern District of California in this case (App. 32a-55a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit which is sought to be reviewed was entered on April 3, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act of 1890, as amended, 15 U.S.C. §1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

Section 2 of the Sherman Act of 1890, as amended, 15 U.S.C. §2, provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

STATEMENT OF THE CASE

A. Statement of the Facts

Doxorubicin is a leading anti-tumor compound widely prescribed for the treatment of certain cancers. During the relevant period, the U.S. doxorubicin market was highly concentrated with only four manufacturers in the world possessing the requisite approval by the U.S. Food and Drug Administration to produce bulk doxorubicin for sale in the United States.[1] Because doxorubicin is a highly toxic, strictly regulated pharmaceutical that can be processed for distribution by only a limited number of technologically capable U.S. distributors, the number of entrants and potential entrants in the U.S. doxorubicin market was significantly limited. (App. 63a-64a).

1. Sicor's Entrance Into the Monopoly Market

Until 1988, Farmitalia and its affiliated U.S. distributor, Erbamont, Inc. ("Erbamont"), had a virtual monopoly on the sale of doxorubicin by ownership of a patent on the product.[2] In 1989, the plaintiff Sicor, a generic manufacturer of bulk doxorubicin located in Italy and approved by the United States Food and Drug Administration,

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[1/]The four FDA qualified doxorubicin manufacturers were comprised of two Italian companies -- Sicor and Farmitalia Carlo Erba, S.r.l. ("Farmitalia") -- and two Japanese pharmaceutical manufacturers -- Meiji and Mercian. In addition, there was a doxorubicin manufacturer in China, one in Russia and one in Hungary which did not have, and were believed not qualified to receive, FDA approval.

[2/]Farmitalia and Erbamont are sister companies, both owned by Erbamont N.V. Farmitalia and Erbamont marketed doxorubicin in the United States under the brand name Adriamycin, which was "finished" by their wholly-owned affiliate, Adria.

sought to enter the U.S. doxorubicin market by competing on the basis of price.

Sicor, which had no independent facilities of its own in the United States, sought an American company qualified to "finish" and distribute the bulk doxorubicin to be supplied by Sicor. Although doxorubicin is a potent weapon against cancer, it is highly toxic and the encapsulation or "finishing" of bulk doxorubicin into dosage form must be done in a rigorously controlled environment. Sicor introduced evidence that, even within the American pharmaceutical industry, it could find only three companies feasibly able to perform the finishing function in compliance with FDA standards, and only one of those companies -- Cetus-Ben Venue Therapeutics ("CBVT") -- was willing and able to finish bulk doxorubicin in a manner that was commercially viable.[3] (App. 64a-65a).

Sicor executed a Supply and Distribution Agreement with CBVT which permitted the two companies to aggressively market doxorubicin in the United States, first with the powder form of the drug in mid-May 1989, and then with the solution form in mid-June 1989. The arrangement was successful in that, by the end of 1990, the price of doxorubicin to cancer patients had declined by approximately 40% and Sicor and its finisher/distributor, CBVT, had obtained a 30% share of the doxorubicin market previously monopolized by Farmitalia and its distributor and sister company, Erbamont. (App. 66a).

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[3]/CBVT is a joint venture partnership of respondents Cetus Generic Corporation and Ben Venue Generic Corporation. The other two respondents, Cetus Corporation and Ben Venue Laboratories, Inc., are the respective parent corporations of the two CBVT general partners.

2. Monopolist Manufacturer Acts to Exclude Its Only Significant Competitor

Farmitalia responded to this post-patent monopoly competition by taking a number of actions to prevent Sicor from importing bulk doxorubicin into the United States. These included a complaint to the International Trade Commission seeking to bar the importation of doxorubicin (the complaint was dismissed), and the filing of several patent infringement suits (none successful). (App. 68a).

Concurrently with its domestic attacks on Sicor's marketing of doxorubicin, Farmitalia initiated proceedings in Italy in an attempt to enjoin further production of bulk doxorubicin at Sicor's Italian facility. This contested proceeding in Italy, which is still unresolved, resulted in Farmitalia obtaining a temporary injunction closing down Sicor's manufacturing facility. As a result, Sicor arranged to supply its finisher/distributor, CBVT, with bulk doxorubicin from another FDA approved facility. (App. 66a-67a).

In one of its patent infringement actions, Farmitalia challenged the sale of doxorubicin in solution form by CBVT. Doctors had begun to express a preference for the administration of doxorubicin in solution form to treat certain types of cancer. Sicor, together with its U.S. finisher/distributor, CBVT, were the only other suppliers/distributors of solution form doxorubicin in the United States and, thus, Farmitalia's sole competition for this significant section of the U.S. doxorubicin market.[4]

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[4]/In anticipation of Farmitalia's threatened solution patent action, Sicor and CBVT obtained the opinion of respected U.S. patent counsel that Farmitalia's patent on solution form doxorubicin was invalid. Accordingly, Sicor shared in funding an action brought by CBVT seeking, *inter alia*, a declaratory judgment of invalidity of the solution form patent. That meritorious challenge to the patent was terminated by CBVT when it entered into the contract to displace Sicor

3. The Collusive Supply Agreement to Restore the Monopoly

Concealing their negotiations from Sicor, CBVT and Farmitalia negotiated an agreement by which CBVT would abandon its existing agreement to purchase bulk doxorubicin from Sicor. CBVT pledged to acquire all future supply of doxorubicin (including powder form) exclusively from Farmitalia. Unlike the Sicor-CBVT Supply and Distribution Agreement, which contained incentives for competitive pricing by CBVT, the pricing formula for the sale of Farmitalia bulk doxorubicin to CBVT significantly increased the wholesale price and severely limited the ability of CBVT to engage in price competition with Farmitalia. CBVT abandoned its competitive distribution agreement with Sicor in order to distribute Farmitalia doxorubicin exclusively. (App. 67a).

The CBVT-Farmitalia secretive and exclusive agreement had an immediate and anti-competitive effect on the already concentrated doxorubicin market. Sicor, which was Farmitalia's only significant competing supplier (with 30% of the market) -- and Farmitalia's only competitor for the sale of solution form doxorubicin -- was deprived of its only viable finisher/distributor and eliminated from the market. Farmitalia's market share surged, practically overnight, from 60% back to 89%. Instead of three suppliers competing at the wholesale level -- Farmitalia (60%); Sicor (30%); and Meiji (9%) -- there were now only two -- Farmitalia (89%) and Meiji (11%).[5] As for the fastest growing segment of the

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and to obtain all future bulk doxorubicin requirements from Farmitalia.

[5]/Meiji's minimal presence in the market was based on long-term supply arrangements with two fringe distributors, Bristol Myers and Astra, which sold branded generic doxorubicin products under a license agreement with Farmitalia. As the record indicates, these two

U.S. doxorubicin market, the physician-preferred solution form, the exclusive CBVT-Farmitalia arrangement once again made Farmitalia the sole player in that important market segment.

As a result of Sicor's exclusion from the market (as a supplier of Mercian or its own bulk doxorubicin), Farmitalia was able to dictate the price structure for both brand-name and generic doxorubicin in the U.S. market. After Sicor had been removed from the market through the loss of its distributor, the price of doxorubicin stabilized at an artificially high level. Moreover, Farmitalia's own internal documents acknowledged that, but for the elimination of generic competition, a further decline in the price of doxorubicin was anticipated.

B. The Proceedings Below

On April 25, 1991, Sicor filed suit in the United States District Court for the Northern District of California alleging that the exclusive supply contract between Farmitalia and CBVT violated §§ 1 and 2 of the Sherman Act. Sicor also brought California State law claims against CBVT for breach of the Supply and Distribution Agreements between Sicor and CBVT. The federal law claims which are at issue here were brought in the District Court pursuant to the provisions of 28 U.S.C. §§ 1331 and 1337.

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companies did not compete vigorously in terms of pricing, and their ability to compete was further limited because they were paying Farmitalia royalties. After Sicor's elimination from the market, Farmitalia had at least some form of price control or influence over all four distributors -- either through its exclusive supply arrangements with CBVT and Erbamont, or its royalty agreements with Bristol Myers and Astra.

The District Court granted summary judgment against Sicor on all counts. It held that under the Supply Agreements between Sicor and its distributor, CBVT, Sicor was obligated to supply doxorubicin manufactured at its Italian facility rather than doxorubicin which met defined U.S. pharmacopoeia quality standards. As to the antitrust counts, the District Court called the exclusive dealing contract "pro-competitive," holding that notwithstanding the elimination of the only significant generic manufacturer which had entered the U.S. market there was no net change in competition because the number of down stream distributors remained the same. The District Court ignored Farmitalia's vertical control over and exclusive dealing contracts with the distributors, and the adverse effect upon price competition caused by recapture of a monopoly share of the market. The District Court entered a Final Judgment of Dismissal of Plaintiffs' Claims under Fed.R.Civ.P. Rule 54(b) on March 19, 1993.

On April 2, 1993, Sicor appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1291.[6] On appeal, the Court of Appeals for the Ninth Circuit reversed the District Court's grant of summary judgment on the State law contract claims. It held that there was ample evidence in the record to support Sicor's contention that its supply contract provided for and entitled it to supply FDA approved doxorubicin from an alternate source to its Italian facility.

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[6]/Sicor noticed for appeal the District Court's ruling with respect to all antitrust and pendant state law claims against all the Cetus, Ben Venue, Erbamont and Farmitalia defendants. On August 13, 1993, a "Stipulation Regarding Voluntary Dismissal of Appeal" was filed with respect to Erbamont N.V., Erbamont, Inc. and Farmitalia Carlo Erba, S.r.l. This stipulation dismissed only these parties and kept intact Sicor's antitrust claims against the Cetus and Ben Venue parties to this proceeding.

The Circuit Court upheld the grant of summary judgment on the antitrust count, however, reiterating the District Court's conclusion that the restoration of a 90% monopoly in the supply of doxorubicin was "pro-competitive" because the exclusive supply contract permitted doxorubicin *produced* by Farmitalia to be distributed by CBVT in addition to the distribution through Farmitalia's own subsidiary. The Circuit Court ignored the demise of price competition at the consumer level.

The Circuit Court also held that the exclusive dealing contract was excused from antitrust liability because it was made with a valid business justification. The specific justification offered by the Court was that it enabled Farmitalia to make more money.

The Court also asserted that the exclusive supply arrangement permitted CBVT to remain in business as a distributor. CBVT would have remained in business as a distributor in any event, however, since Sicor had provided for a continuing supply of bulk doxorubicin in accordance with the terms of its existing supply contract with CBVT. Thus, but for the exclusive dealing contract which restored the monopoly on source of product and eliminated price competition, there would have been two manufacturers competing on the basis of price, each served by a different distributor.

REASONS FOR GRANTING THE PETITION

1. The Conclusion That the Farmitalia/CBVT Arrangement Was Pro-Competitive Conflicts With This Court's Antitrust Principles

The dominant manufacturer's new contract to become the exclusive supplier to its principal competitor's only distributor eliminated price competition and restored it to an 89% share of the market. This exclusive dealing agreement was said to be exempt from trial on the merits because, as a matter of law, there was no liability under the Sherman Act. The Ninth Circuit held that exclusion of the monopolist's competitor through capture of the competitor's only distributor could not have an anticompetitive effect since the number of *distributors* remained the same. The Ninth Circuit deemed it immaterial that the exclusive dealing contract had the intended effect of eliminating competition at the manufacturing level.

The circuit court also stated that it was "beside the point" that the number of *viable* distributors was limited. (App. 14a). It held that irrespective of any high entry barriers to the market, the elimination of the only manufacturer which competed on the basis of price merely left the market where it was before that competitor's entry into the market. There are three responses to this conclusion.

First, the market did not remain where it was prior to the elimination of Sicor. At the time of Sicor's displacement, doxorubicin manufactured by Farmitalia accounted for 60% of the market; Sicor's doxorubicin accounted for 30% of the market; and fringe sales, not made on a price competitive basis, accounted for a fairly constant 10% of the market. After the exclusive dealing contract between Cetus and Farmitalia was signed, doxorubicin manufactured by Farmitalia accounted for 89% of the market and the price differential between

doxorubicin sold by Farmitalia's subsidiary and the price at which it had been offered through Sicor's distributor had essentially vanished. Thus, to characterize the market situation as unchanged, because the same number of distributors remained, is inaccurate.

Second, the Ninth Circuit failed to consider that prior to Sicor's entry the market was a monopoly market, albeit a lawful patent monopoly. Once that patent monopoly had expired, however, there was no reason for the market to remain a monopoly market. The elimination of Sicor and the resulting restoration of the monopoly cannot be exempt from antitrust scrutiny on the basis that the exclusive dealing contract merely restored the monopoly.

Third, the basis for any comparison should not have been the state of the market prior to Sicor's entry, because Sicor's entry as a low priced competitor of a generic pharmaceutical product was an established fact. It had already succeeded in obtaining a 30% share of the market through price competition, which resulted in a 40% decrease in the price of doxorubicin to cancer patients.

This Court should review the decision of the court of appeals because the legal principles adopted in the decision are markedly contrary to important prior precedents of this Court. This Court has held that exclusive dealing contracts between a dominant vertically integrated manufacturer-distributor and independent distributors which are alleged to unfairly restrain trade are to be examined under a rule of reason analysis. By looking *only* to the number of distributors remaining in the market, the Ninth Circuit's holding discards the necessity for such a test. It thereby presents an important federal question as to whether this Court's holdings have been modified or are no longer applicable.

The essence of the Ninth Circuit's holding is that no further analysis is necessary if a vertically integrated monopolist offers increased profit as its business justification for eliminating competitors by signing exclusive dealing contracts with their distributors *so long as there is no change in the number of distributors*. This rationale, which would apply in other situations if the precedent stands, is incompatible with the holdings of this Court in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1948) and *Standard Oil of California v. United States*, 337 U.S. 293 (1949).

The decision also conflicts with the holding of this Court in *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1917), in which the Court outlined the analysis required to determine whether there has been an unreasonable restraint of trade. It held that the true test of legality is whether the restraint -- here the exclusive dealing contract -- " . . . promotes competition or whether it is such as may suppress or even destroy competition." *Id.* at 237. To resolve that question, "the court must ordinarily consider the facts peculiar to the business under which the restraint is applied," including conditions before and after the restraint was imposed. *Id.* at 238. The Ninth Circuit's opinion effectively eliminates this requirement. As noted, the only tests which the circuit court required to be imposed in analyzing market preemption through an exclusive dealing contract is the profit making motive of the seller and the buyer and whether any distributors -- not manufacturers -- have been eliminated.

In *Yellow Cab*, the Court found that §1 and §2 of the Sherman Act were violated by vertical arrangements in which the dominant manufacturer of taxi cabs and its vertically integrated taxi companies contracted with other local cab companies to purchase taxis exclusively from Yellow Cab. The effect of these contracts was to foreclose 15% to 100% of various city markets to other

manufacturers. The Court noted that not only could competing manufacturers of taxi cabs no longer sell to these local taxi companies, but that these local taxi companies which otherwise might have looked to another taxi manufacturer for a more competitive purchase price no longer had that opportunity.

In *Standard Oil of California*, the Court struck down exclusive dealing contracts through which an integrated producer-distributor obtained the exclusive right to supply additional independent distributors of gasoline.[7] In *Standard Oil*, the defendant was the largest seller of gasoline in the relevant market with an overall 23% share of the market. Approximately half of its sales to the automobile market were made through company owned service stations and half were made under exclusive dealing contracts with independent service stations. (Additional sales were made to industrial users.) The gasoline market was an oligopoly market and was not nearly as concentrated as the monopoly market for doxorubicin. The Court held that the most important factor in determining whether the exclusive dealing contracts were lawful or unlawful would be the degree of market control resulting from the arrangements. *Standard Oil* at 308. The greater the dominance, the stronger the inference that the requirement contracts had been used to stifle competition rather than to serve legitimate economic needs. *Id.*

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[7]/The government attacked the exclusive dealing contracts as violative of §1 of the Sherman Act and §3 of the Clayton Act, 15 U.S.C. §§1, 14. Although the Court's analysis was couched in terms of the restriction on exclusive dealing articulated in §3 of the Clayton Act, the analysis in the instant case would be no different for purposes of the Sherman Act. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), for continued discussion of the interplay between these two complementary statutory prohibitions on anticompetitive exclusionary contracts.

These cases, and others, collectively hold that challenges to exclusive dealing contracts as anticompetitive must be examined with reference to the nature of the restraint and the share of market which is foreclosed as a result of the contracts. It presents an important Federal question as to whether, therefore, summary judgment may be granted as a mater of law where the undisputed record confirmed an overwhelming degree of dominance, the elimination of the only significant competition, and cessation of price competition at both the distribution and manufacturing level.

2. The Ninth Circuit's Pro-Competitive Analysis Conflicts With Other Circuits' Precedent

In addition to undermining the long-standing standard established by this Court for determining Sherman Act violations, the Ninth Circuit's decision conflicts with other circuits' legal criteria for determining the anticompetitive effects of exclusive dealing arrangements. If the Ninth Circuit opinion is not reversed, there will be different standards and different results among the circuits when exclusive dealing arrangements resulting in monopolization are scrutinized.

A prime example of the conflict which the Ninth Circuit's decision has engendered can be found in *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979). In *Burger King*, the Tenth Circuit held that an exclusive dealing arrangement which foreclosed part of the market to products of a competing supplier -- even though the number of distributors remained the same -- presented a triable question of whether competi-

tion was restrained in violation of the Sherman Act.[8] In reversing the district court's summary dismissal of the complaint, the Tenth Circuit found that the elimination of an alternative-source distributor, and its replacement by a distributor whose exclusive source of supply was the existing dominant supplier/distributor in the market, could constitute "a substantial lessening of competition in the market." *Id.* at 1375.

There, as here, the only significant alternative supplier was frozen out of the market, and buyers had to purchase either directly from the dominant supplier (through its wholly-owned distribution network) or from the so-called competing distributor (who was contractually limited to selling only those products of the dominant supplier). As noted by the Tenth Circuit:

> The antitrust vice of these arrangements is the foreclosure of part of the market in which the seller competes by taking away the freedom of the buyer to choose from the products of competing traders in the seller's market.

Id. at 1374.

Moreover, the Tenth Circuit made clear that where, as here, the arrangement lessens competition at the supply level, the Sherman Act is violated even if the dominant supplier's motivation is solely to "increase its share of the

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[8]/For purposes of its antitrust analysis, the Tenth Circuit held that a requirements contract is "functionally the same" as an exclusive supply agreement "if it commits the buyer to acquire all the products it needs from the seller." *Id.* at 1374. Citing this Court's holding in *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457 (1922), the Circuit Court went on to state that "[t]he agreement need not specifically require the buyer to forego other supply sources if the practical effect is the same." *Perington Wholesale, Inc.*, 631 F.2d at 1374.

relevant market" rather than "a desire to damage" its competitor "or put it out of business." *Id.* at 1374.

Also in conflict with the Ninth Circuit's decision is the Third Circuit's holding in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978). There, as in this case, the court was faced with a defendant pharmaceutical company which enjoyed the "awesome power of . . . a legal monopolist when it was engaged in the manufacture and sale of its original patented products . . . ." *Id.* at 1065. Eli Lilly, like Farmitalia/Erbamont, controlled "from 100% to 89.8%" of the specific drug market prior to the expiration of its patent monopoly.[9] *Id.* Through market practices analogous to Farmitalia/ Erbamont's exclusive dealings arrangement with CBVT, Eli Lilly was able to maintain its monopolistic market share after its patent monopoly expired.[10]

In contrast to the Ninth Circuit's analysis, however, the Third Circuit found nothing "pro-competitive" about a monopolist's ability to maintain the status quo after its patent's expiration. As explained by the Third Circuit:

> Although it enjoyed the status of a legal monopolist when it was engaged in the manufacture and sale of its original patented products, that status changed . . . . The goal of [Eli Lilly's post-patent market actions] was to associate Lilly's legal monopolistic practices with an illegal activity that directly affected

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[9]/"Notwithstanding that its position in the market was orginally the result of its patents," the Third Circuit considered this share to be "monopolistic." *Id.*

[10]/Eli Lilly sought to limit its only significant competing supplier's ability to market a rival drug by linking rebates on the product with sales of other drugs on which Eli Lilly faced no competition.

> the price, supply, and demand of [the drugs]. Were it not for Lilly's [action], the price, supply, and demand of [the drugs] would have been determined by the economic laws of a competitive market. [Lilly's post-patent market actions] blatantly revised those economic laws and made Lilly a transgressor under §2 of the Sherman Act.

Id. at 1065.

Under the Third Circuit's analysis in *Eli Lilly*, the fact that the number of competitors in the market remained the same before and after the expiration of the patent monopoly was immaterial. The proper focus -- one which the Ninth Circuit's decision erroneously ignores -- is whether the monopolist "entrenched [its] position as a supplier" after the expiration of the patent in a way that "made competition from a new entrant to the market unlikely." *Id.* at 1065. Applying the Third Circuit's standard to this case, where the monopolist regained its 89% share of the market; where the sole significant competitor (with a 30% share) is eliminated; and where the previously falling product price immediately stabilizes at an artificially high price, would unquestionably lead to a contrary result to the Ninth Circuit's improper affirmance of summary dismissal of all antitrust claims.

The Ninth Circuit's decision also conflicts with longheld precedent of the Second Circuit which states that "[w]here the alleged violator dominated or was a leader in the industry, proof of such fact was . . . determined to be a sufficient predicate from which to conclude that the use of exclusive-dealing contracts was violative" of the antitrust laws. *Dictograph Products v. Federal Trade*

Comm'n, 217 F.2d 821, 827 (2d Cir. 1954).[11] The Second Circuit emphasized that even though the number of manufacturers in the market had risen more than four-fold in three years, the defendant's contention that "competition in the industry has . . . increased" was rendered irrelevant by the fact that "petitioner has maintained its position, during all this period of growth in the industry . . . by means of . . . restrictive, exclusive dealing agreements." *Id.* at 824.

Properly focusing on the share of the market affected by the exclusive dealing arrangement (and its effect on the participants' ability to maintain market power), the Second Circuit held that Dictograph's exclusive dealing contracts were illegal despite the fact that the defendant was merely one of the three largest suppliers in an oligopolistic market, and its exclusive dealing arrangement was determined to affect only 22% of the relative market's distribution outlets. Even under §1's heightened standard, Farmitalia/Erbamont's arrangement with CBVT, which propelled Farmitalia back to a market monopoly share of 89% and foreclosed 30% of the market from its only significant competitor, would warrant a similar finding of illegality under the Second Circuit's standard.

A similar conflicting result would be had under the Sixth Circuit's §3 standard espoused in *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). Stating that the district court had set "too high a burden" for showing anticompetitive practices, the Sixth Circuit remanded the

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[11]/The Second Circuit's holding in *Dictograph* involved an alleged violation of § 3 of the Clayton Act. As this Court has noted on several occasions, the analysis for § 1 Sherman Act and § 3 Clayton Act violations is similar even though the threshold for determining injury to competition is slightly higher under § 1. *See Tampa Electric*, 365 U.S. at 325-29, 335.

dismissal of plaintiff's exclusive dealing claims for further analysis as to whether the "contracts were intended to stifle competition" in light of "the relevant strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Id.* at 194-95, *quoting, Tampa Electric Co.*, 365 U.S. at 329.

On remand the district court held that "[e]ven though there are sound and legitimate reasons for entering into full-supply or committed supply contracts," Dairymen, Inc.'s control of nearly 60% of the market, coupled with "the timing of the execution of [the exclusive dealing] contracts . . . renders them in violation of Section 3 of the Clayton Act." *United States v. Dairymen, Inc.*, 1983-2 Trade Cases ¶65,651, 1983 WL 1880 (W.D. Ky. June 9, 1983), aff'd, 758 F.2d 654 (1985). This result is diametrically opposite to that reached by the Ninth Circuit.

3. "Making Money" Is Not A Valid Business Reason for Monopolizing

A second fundamental flaw in the Ninth Circuit's holding is its conclusion that a monopolist's desire "to make money" constitutes a valid business justification which eliminates antitrust liability. (App. 13a). As stated by the Ninth Circuit:

> Moreover, it is apparent from the materials before us that valid business reasons existed for CBVT's action, *i.e.*, CBVT's reason for buying from Farmitalia was to obtain the product, and Farmitalia's reason for selling that product to CBVT was to make money. In the absence of a showing of selling at a loss

> or similar conduct explainable only by a motive to reduce or eliminate competition, the appellants' claim is not persuasive. If there is a valid business reason for [the defendant's] conduct, there is no antitrust liability.

(App. 13a, emphasis added, citation omitted).

This erroneous conclusion of law is contrary to the Supreme Court principles for "rule of reason" analysis, and is in conflict with holdings in other circuits. The proposition that a monopolist's actions do not violate the antitrust laws merely because they are motivated by profit finds no support in any precedent in any circuit, and would lead to the irrational result of immunizing a monopolist's predatory acts, so long as they were financially successful. That is clearly not the law as articulated by this Court or in other circuit courts.

In a conflicting opinion, the Fifth Circuit held:

> There can be no doubt that becoming a complete monopoly may improve a business' financial condition. But becoming a monopoly simply to make more money is not a "legitimate business justification" for "monopolizing".

Poster Exchange, Inc. v. National Screen Serv. Corp., 431 F.2d 334, 340 (5th Cir.), *cert. denied*, 401 U.S. 912 (1970).

The Second Circuit reiterated this principle in *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir.), *cert. denied*, 500 U.S. 928 (1990). In that case, the defendant monopolist, Conrail, successfully argued to the district court that "since the [defendant's conduct] was intended to increase short-term, as well as long-term, profits, Conrail is insulated from [antitrust] liability." *Id.* at 178. On the appeal from the district court's grant of summary judgment in favor of Conrail, the Second Circuit rejected Conrail's contention that "conduct which has profit maximization as a goal cannot violate

§2." *Id.* Reversing the district court's summary dismissal of plaintiff's antitrust claims, the Second Circuit stated:

> A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.

Id. at 178.

The Ninth Circuit's holding that "making money" constitutes a valid business reason set a conflicting standard with the decisions by the Fifth and Second Circuits as to what constitutes monopolization. The identical conduct which the Ninth Circuit holds to prevent a finding of monopolization is not accepted as an excuse by other circuits. Moreover, the money-making justification espoused by the Ninth Circuit, if allowed to stand, would eviscerate the parameters which this Court has established for proper "rule of reason" analysis in antitrust cases.

In *National Soc. of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), this Court outlined the boundaries for analyzing whether valid business reasons justified an otherwise anticompetitive act. Citing the "Rule of Reason" as a "central principle of antitrust analysis," this Court emphasized:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

Id. at 688.

Valid business reasons for restraints which "impact on competitive conditions" have been described by this Court as "superior service, lower costs, and improved

efficiency." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380-81 (1973). Such motivations further the overall purpose of the antitrust laws in that they tend to benefit consumers, even if they might otherwise harm competing businesses. No such laudatory or beneficial purpose can be attached to a monopolist's innate desire to "make money."

Not only does the Ninth Circuit's "money-making" business justification run afoul of well-settled antitrust precedent, it totally ignores the unrebutted evidence of record in this case as to the defendants' true business reason for their anticompetitive acts. As was made clear by the defendants' own business documents, the driving motivation for eliminating Sicor from the market was to tie up CBVT, the only remaining viable finisher/distributor and a leading player in the generic doxorubicin market, thus ensuring a larger share of the total doxorubicin market. As a result of their agreement with CBVT, Farmitalia's share of the total doxorubicin units sold increased to 89%.

Thus, the Ninth Circuit's "business justification" holding in this case erred in two key respects. First, it immunized the defendants' violative acts on the erroneous ground that a monoplist's desire to "make money" constituted a valid business reason. Secondly, it did so on the basis of an improper summary judgment determination that ignored unrebutted evidence of the defendants' anticompetitive intent. Whether valid business reasons motivated a monopolist's conduct is a question of fact, *see Eastman Kodak Co. v. Image Technical Servs., Inc.*, ___ U.S. ___, 112 S. Ct. 2072, 2091 (1992), and the Ninth Circuit has departed from this Court's policy with respect to summary judgment determinations.

4. A Monopolist's Stabilization of Declining Market Prices Constitutes an Injury to Competition

The essence of the antitrust laws is to ensure fair price competition in an open market. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). When the market is manipulated to exclude competition and stabilize prices, an injury to competition occurs. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

Ignoring these fundamental principles, the Ninth Circuit has adopted an erroneous standard under which no antitrust claim could prevail unless accompanied by evidence of "output decreases or price increases" in the market.

> [T]he factual support needed to show injury to competition must include proof of the . . . restraints anticompetitive effects within those [relevant geographic and product] markets . . . . proof of actual detrimental competitive effects such as output decreases or price increases.

(App. 11a-12a).

This impermissibly narrow interpretation of competitive injury is contrary to the opinion in *Container Corp.*

> Stabilizing prices as well as raising them is within the ban of §1 of the Sherman Act. As we said in *United States v. Socony-Vacuum Oil Co.*, [310 U.S. 150 (1940)], at 223 . . . "in terms of market operations stabilization is but one form of manipulation."

Container Corp., 393 U.S. at 337.

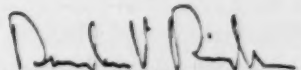
Thus, by applying a standard that disregarded uncontested evidence that Farmitalia and CBVT's exclusive arrangement had stabilized previously declining prices

at an artificially high level, the Ninth Circuit has created an exception to antitrust law interpretation by this Court.

CONCLUSION

The Ninth Circuit's opinion adopts a standard for analyzing, and excepting from antitrust liability, exclusive dealing contracts which undermines the standard enunciated by this Court, and which conflicts with the standard utilized by other circuit courts. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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